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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RODNEY G. JEFFCOAT, Defendant and Appellant.	D052250 (Super. Ct. No. SCD200420)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed as modified.

Rodney Jeffcoat appeals from a judgment convicting him of involuntary manslaughter (count 1); assault by means of force likely to produce great bodily injury, and the lesser offenses of battery and simple assault (count 2); and conspiracy to obstruct justice (count 3). He asserts (1) the trial court erred by failing to give the jury a unanimity instruction concerning the involuntary manslaughter charge; (2) the trial erred

by refusing to apply Penal Code[1] section 654 to stay the sentence on his conviction for assault by means of force likely to produce great bodily injury; and (3) his convictions for battery and simple assault must be dismissed because they are lesser included offenses of assault by means of force likely to produce great bodily injury. The Attorney General concedes, and we agree, the simple assault conviction must be dismissed as a lesser included offense of assault by means of force likely to produce great bodily injury. Further, after receiving supplemental briefing from the parties, we conclude that although battery is not a lesser included offense of assault by means of force likely to produce great bodily injury, the battery conviction must also be dismissed because Jeffcoat cannot properly be convicted of two offenses for a single count. We reject Jeffcoat's other contentions of error.

We modify the judgment to strike the battery and simple assault convictions. As so modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2006, Jeffcoat and his girlfriend, Trevesia Blount, brought Blount's two-year-old daughter, Kenvesia, to the hospital. Hospital personnel determined that Kenvesia was deceased; her body was already starting to decompose; and she had likely been dead for hours or days before she was brought to the hospital.

An autopsy of Kenvesia's body revealed that she had been subjected to repeated physical abuse. She had blunt force and burn injuries and scars all over her body. The

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1 Subsequent statutory references are to the Penal Code.

injuries and scars were consistent with repetitive, forceful hitting with a stick or belt and scalding with hot liquid.

Blount, who had earlier pleaded guilty to felony child abuse with infliction of great bodily injury, testified at trial on behalf of the prosecution. Blount testified that she began dating Jeffcoat in December 2005. In late June or early July 2006 Blount and her two daughters had been staying continuously with Jeffcoat and his mother at their home in Riverside. Jeffcoat and Blount disciplined Kenvesia by striking her with a belt. Jeffcoat also used wood sticks from a piece of furniture to strike her, and he poured hot water on her. During this time period Kenvesia suffered a seizure at Jeffcoat's house.

On or about July 20, 2006, Blount, who was in the kitchen, heard a "big banging noise" coming from Jeffcoat's bedroom that sounded like someone getting knocked into the wall. She went to the bedroom and saw Kenvesia "tensing up" on the floor and Jeffcoat standing by the door looking at Kenvesia. When Blount picked Kenvesia up, she was not breathing. Blount stayed with Kenvesia in the bedroom for the next three days. The temperature in Riverside during that time was over 100 degrees, and there was no air conditioning or operating fans at the home because of a brownout. Kenvesia never woke up or moved during the three days, but Blount thought she might have had a pulse and might have been breathing. When Kenvesia's body started to show signs of decomposition, Blount thought she was dead.

On July 23, 2006, Blount and Jeffcoat decided to take Kenvesia to the hospital in San Diego. They agreed to tell the authorities that Kenvesia had burned herself by pulling cooking hot dogs down on herself at Blount's home in San Diego.

Prosecution and defense experts testified regarding the factors that contributed to Kenvesia's death. The experts essentially agreed that these factors included hyperthermia from the extreme temperatures that were occurring in Riverside; the debilitated state of Kenvesia's health from chronic battering; subdural hemorrhage (bleeding) in her brain; her history of seizures, and early stages of broncho-pneumonia in her lungs. However, the prosecution expert stated Kenvesia had also suffered a recent blunt force trauma to her head which contributed to her death, whereas the defense experts stated there had been no recent head trauma.

Dr. Christina Stanley testified for the prosecution that recent trauma to Kenvesia's head was shown by a laceration on the back of her head, a recent subdural hemorrhage, and brain injury demonstrated by the presence of axonal retraction balls.[2] Dr. Stanley stated the head laceration was consistent with someone hitting Kenvesia's head against the corner of a table, door, or wall, and the recent subdural hemorrhage and axonal retraction balls could have been caused by the swinging of her head and the slamming impact.

In contrast, defense experts Drs. Janice Ophoven and David Wolfe testified there was no recent blunt force trauma to Kenvesia's head. These experts stated that the absence of blood under the laceration showed that it occurred postmortem from moving the body; there was only old, not recent, subdural hemorrhage; and there were no axon

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2 "Axonal retraction balls" refer to swelling of the axons (the "wiring portion of the neuron[s]").

retraction balls demonstrated in Kenvesia's head. They opined that the failure to seek medical aid, not a recent assault, was a primary factor contributing to her death.

Jury Verdict and Sentence

Jeffcoat was charged with murder (count 1), assault on a child by means of force likely to produce great bodily injury resulting in death (count 2), and conspiracy to obstruct justice (count 3). The jury was instructed on these charged offenses, as well as on the lesser offense of involuntary manslaughter for count 1, and several lesser offenses for count 2 (including assault by means of force likely to produce great bodily injury, battery, and simple assault). The jury was given a standard *Stone*[3] instruction advising them not to return a guilty verdict on the lesser offenses unless it acquitted on the greater offenses.

The jury found Jeffcoat not guilty of counts 1 and 2 as charged, and found him guilty of the lesser included offenses of involuntary manslaughter (§ 192, subd. (b)) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) for these counts. Additionally, contrary to the *Stone* instruction, for count 2 the jury returned guilty verdicts for the lesser offenses of battery (§ 242) and simple assault (§ 240). The jury found him guilty of conspiracy to obstruct justice as charged in count 3. (§ 182, subd. (a)(5).)

Jeffcoat was sentenced to five years, eight months in prison. His sentence consisted of the upper term of four years for involuntary manslaughter, a consecutive

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3 *Stone v. Superior Court* (1982) 31 Cal.3d 503.

term of one year for assault by means of force likely to produce great bodily injury, and a consecutive term of eight months for obstruction of justice. Sentences on the battery and simple assault convictions (which were misdemeanors) were stayed pursuant to section 654.

DISCUSSSION

I. *No Unanimity Instruction Error*

Jeffcoat argues his involuntary manslaughter conviction must be reversed because the trial court failed to instruct the jury that it must unanimously agree which acts formed the basis for this offense. To support his argument, he asserts the jury could have relied on either of two distinct acts to establish involuntary manslaughter: (1) the failure to seek medical intervention for Kenvesia, or (2) the physical abuse inflicted on Kenvesia. Because the record shows the jury was instructed that a guilty verdict on involuntary manslaughter required a finding of failure to seek medical aid, we reject his contention of instructional error.

A defendant's constitutional right to a unanimous jury verdict requires that when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon or the trial court must sua sponte give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction is designed to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agreed the defendant committed. (*Ibid*.)

The prosecutor's theory of the case was that Jeffcoat had committed murder, either as a principal or an aider and abettor, by hitting Kenvesia's head against a wall or door, beating her, and burning her. However, the prosecutor agreed with defense counsel that the jury should be instructed on involuntary manslaughter as a lesser included offense of murder based on a theory of criminal negligence for not seeking medical aid for Kenvesia.

Accordingly, when the jury was instructed on the lesser included offense of involuntary manslaughter, it was told as follows: "The People allege that the defendant committed the following crime with criminal negligence: the defendant, as a caregiver, failed to seek medical intervention or aid for Kenvesia. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved." (See CALCRIM No. 580.) This instruction clearly advised the jury that it was *required* to find that Jeffcoat failed to seek medical aid in order to return a guilty verdict for involuntary manslaughter. There was no instruction to the jury suggesting that it could premise an involuntary manslaughter verdict on the evidence of assault. Further, in closing arguments to the jury, the prosecutor focused on the assault evidence as indicative of *murder*, not involuntary manslaughter. Defense counsel's arguments focused on a theory that Trevesia was the responsible party and that Jeffcoat should be acquitted of all charges. There is nothing in the record that indicates the parties or the court deviated from the stated intention to present the involuntary manslaughter option to the jury through an instruction referring to the evidence of failing to seek aid.

Had the jury been presented with *both* failure to seek aid and assault as potential factual predicates to support involuntary manslaughter, a unanimity instruction would have been required to ensure that the jury unanimously agreed Jeffcoat committed one of these discrete acts. However, it is clear from the record that the only factual predicate presented to the jury for involuntary manslaughter was failure to seek aid, and the instructions *required* a finding of failure to seek aid to support the offense. Absent a contrary showing in the record, we presume the jurors followed the trial court's instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) On this record, there was no danger that the jurors would convict Jeffcoat of involuntary manslaughter without all agreeing that he engaged in the conduct of failing to seek aid. Accordingly, the trial court was not required to give a unanimity instruction concerning the distinct acts of failing to seek medical aid and assault.[4]

II. *Proper Punishment for Both Involuntary Manslaughter and Assault by Means of Force Likely to Produce Great Bodily Injury*

Jeffcoat argues the trial court erred in imposing a consecutive sentence for count 2 assault by means of force likely to produce great bodily injury because the sentence should have been stayed under section 654. He contends the jury could have convicted

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[4] We note that arguably the evidence of assault could also support an involuntary manslaughter verdict, and if so, the trial court should not have confined the involuntary manslaughter instruction to the conduct of failing to seek aid. (See *People v. Benavides* (2005) 35 Cal.4th 69, 103; *People v. Evers* (1992) 10 Cal.App.4th 588, 595-597.) Jeffcoat does not raise this argument on appeal, and in any event any such error would be harmless given the jury's involuntary manslaughter verdict.

him of count 1 involuntary manslaughter based on the evidence of his failure to seek medical aid *or* the evidence that he engaged in assaultive conduct, and that if the count 1 verdict was based on the assaultive conduct it involved the same objective as count 2. The record supports the trial court's decision not to apply section 654.

When a defendant sustains multiple convictions arising out of a single act or indivisible course of conduct, section 654 permits only one punishment for the defendant's conduct. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of criminal conduct is divisible so as to allow multiple punishment depends on whether the defendant had a separate criminal objective for each offense. (*Ibid*.) If the defendant acted with only one objective, the defendant may be punished for only one offense, and sentence on the other offenses must be stayed. (*People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Liu, supra,* 46 Cal.App.4th at p. 1135.) However, if the defendant acted with multiple, independent criminal objectives, the defendant may be punished for each of those objectives even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*People v. Liu*, *supra*, at p. 1135.) The issue of whether the defendant entertained multiple criminal objectives is a question of fact for the trial court, and is reviewed on appeal under the substantial evidence standard. (*Id*. at pp. 1135-1136.)

At sentencing, the trial court rejected the contention that sentence on the count 2 offense of assault by means of force likely to produce great bodily injury should be stayed under section 654 because the jury might have based the count 1 involuntary manslaughter verdict on the evidence of assaultive conduct. Rather, the court found that

the count 1 verdict was based on Jeffcoat's failure to seek medical aid, whereas the count 2 verdict was based on his assaultive conduct of burning the victim on a different occasion.[5]

The record supports this finding. As stated, the jurors were instructed that the involuntary manslaughter charge required that they find Jeffcoat failed to seek medical aid. Based on this instruction, which we presume the jury followed, the count 1 verdict reflects a jury finding of failure to seek aid as the basis for the count 1 involuntary manslaughter conviction.

Moreover, in deciding whether Jeffcoat entertained multiple objectives, the trial court was not confined to the particular factual findings underlying the jury's verdicts. When making findings related to sentencing within the prescribed statutory maximum, a trial court may "take into account all of the evidence related to defendant's conduct in committing that offense." (*People v. Towne* (2008) 44 Cal.4th 63, 83-89 [sentencing court could properly consider all facts concerning offense even though jury's acquittal on other counts indicated finding that some facts were not proven beyond a reasonable doubt].) Thus, regardless of the acts relied upon by the jury to support its guilty verdicts, the trial court could properly make *its own* determination that the involuntary

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[5] The trial court found that it was not clearly established that Jeffcoat hit the victim's head against a wall, but that the assault offense was established by the evidence showing that he burned the victim.

manslaughter and assault offenses involved distinct objectives.[6] The record amply supports the distinct objective of failure to seek aid for count 1, and indeed Jeffcoat does not contend otherwise.

Because the record supports independent objectives for counts 1 and 2, the trial court was not required to stay the sentence on count 2 assault by means of force likely to produce great bodily injury.

III. *Erroneous Multiple Convictions*

As stated, for count 2 Jeffcoat was acquitted of the charged offense of assault on a child by means of force likely to produce great bodily injury resulting in death (§ 273ab), and was found guilty of the lesser uncharged offense of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). Further, contrary to the *Stone* instruction it was provided, the jury also found him guilty of two additional lesser offenses for count 2: battery (§ 242) and simple assault (§ 240). The trial court sentenced him to a consecutive term for assault by means of force likely to produce great bodily injury, and stayed sentence for battery and simple assault under section 654.

Jeffcoat argues his convictions of battery and simple assault are impermissible because they are lesser included offenses of assault by means of force likely to produce great bodily injury. The Attorney General concedes, and we agree, that this assertion has

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6 The findings relevant to the section 654 sentencing decision do not implicate a defendant's jury trial rights under the principles set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466. (See *People v. Black* (2005) 35 Cal.4th 1238, 1263-1264, overruled on other grounds in *Cunningham v. California* (2007) 549 U.S. 270, 293.)

merit for the simple assault conviction. We reject his contention as to the battery conviction. However, we conclude the battery conviction must also be dismissed because Jeffcoat cannot properly be convicted of two offenses for count 2.

A. *Dismissal of Assault Conviction Because Assault Is Necessarily Included Offense*

Generally, under section 954 a defendant may suffer multiple convictions for different offenses arising from the same act or course of conduct. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)[7] However, under a judicially created exception to this general rule permitting multiple convictions, a defendant may not receive multiple convictions based on necessarily included offenses. (*Id*. at p. 1227.) An offense is necessarily included in another offense if one offense cannot be committed without also committing the other offense. (*Ibid.*; *People v. Fuller* (1975) 53 Cal.App.3d 417, 422.) This exception is based on the rationale that if the greater offense cannot be committed without committing the lesser, conviction of the greater is *also* conviction of the lesser, and thus to permit conviction of both offenses in effect convicts the defendant twice of the lesser offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702.)

The elements test is used to determine necessarily included offenses for purposes of the multiple conviction bar. (*People v. Reed, supra,* 38 Cal.4th at p. 1229.) Under the elements test, an offense is necessarily included in another offense if all the legal

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[7] However, under section 654, multiple *punishment* may not be imposed for offenses arising from the same act or course of conduct. (*People v. Reed*, *supra*, 38 Cal.4th at pp. 1226-1227.)

elements of one offense are included in the legal elements of the other offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

As conceded by the Attorney General, the simple assault conviction must be dismissed because simple assault is a lesser necessarily included offense of assault by means of force likely to produce great bodily injury. (*People v. Yeats* (1977) 66 Cal.App.3d 874, 879.)

The Attorney General contends that battery is not a necessarily included offense of assault by means of force likely to produce great bodily injury under the elements test. We agree.

The elements of assault are an attempt to commit a battery and the present ability to do so. (§ 240; *People v. Yeats, supra,* 66 Cal.App.3d at p. 878.) The offense of assault by means of force likely to produce great bodily injury contains the additional element of aggravated force. (§ 245, subd. (a)(1); *People v. Yeats*, *supra*, at p. 878.) The elements of battery are a willful and unlawful use of force or violence upon the person of another. (§ 242; *People v. Marshall* (1997) 15 Cal.4th 1, 38.) A defendant who commits a battery has necessarily committed a simple assault, because a simple assault is "nothing more than an attempted battery." (*People v. Fuller, supra,* 53 Cal.App.3d at p. 421.) Thus, convictions for both battery and simple assault are improper. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

However, a defendant who has committed a battery has not necessarily committed assault *by means of force likely to produce great bodily injury*, because the element of aggravated force is not required for battery. (*People v. Fuller*, *supra*, 53 Cal.App.3d at p.

422; see *In re Ronnie N*. (1985) 174 Cal.App.3d 731, 735; *People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4 [battery only requires "'"'the least touching'"'"].) Further, a defendant who has committed assault by means of force likely to produce great bodily injury has not necessarily committed a battery, because battery requires an actual touching of the person, whereas assault is complete upon the attempted use of force or violence on the person even without an actual touching. (See *People v. Marshall, supra,* 15 Cal.4th at p. 38 [battery requires touching]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [assault can be completed without touching]; *People v. Yeats*, *supra*, 66 Cal.App.3d at p. 878 [although battery cannot be committed without committing assault, assault can be committed without committing battery]; *People v. Mueller* (1956) 147 Cal.App.2d 233, 238-239 [same].)

Jeffcoat argues the battery conviction cannot be sustained because in his case the jury's verdict on the assault by means of force likely to produce great bodily injury offense was based on allegations and evidence showing an actual physical touching of the victim, and thus his aggravated assault conviction involved a battery. This contention is derived from an evaluation of *the accusatory pleading and the evidence*, neither of which are permitted for purposes of determining the applicability of the multiple conviction bar. (*People v. Reed, supra,* 38 Cal.4th at p. 1229; *People v. Ortega, supra,* 19 Cal.4th at p. 698; *People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984.) We may consider only the elements of the offenses, and under the elements test assault by means of force likely to produce great bodily injury and battery are not necessarily included offenses. (See *People v. Yeats*, *supra*, 66 Cal.App.3d at p. 878.)

B. *Dismissal of Battery Conviction Because Battery Was Not Alleged as Separate Count*

At our request, the parties submitted supplemental briefing on the question of whether the battery conviction must be dismissed because the jury found Jeffcoat guilty of the greater uncharged offense of assault by means of force likely to produce great bodily injury, and the uncharged battery offense was not alleged as a count distinct from count 2. We conclude that dismissal of the battery conviction is required.

During discussion of the jury instructions, Jeffcoat requested that the jury be instructed on battery as a lesser included offense of count 2 assault on a child by means of force likely to produce great bodily injury resulting in death. The prosecutor questioned whether battery was a lesser included offense of the charged count 2 offense, but ultimately agreed to an instruction on battery as a lesser offense for count 2.

The jury was instructed that battery was a lesser offense for count 2. Further, the jurors were given a standard instruction advising them of the procedure they should follow for completing the verdict forms related to the uncharged lesser offenses; i.e., that they should not complete a verdict form for a lesser offense unless they all agreed the defendant was not guilty of the greater offenses. (See *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519; *People v. Zapata* (1992) 9 Cal.App.4th 527, 533, disapproved on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 305.)[8] The jury was specifically told: "Do not complete a verdict form stating that the defendant is guilty of battery unless you

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8 This "'acquittal first'" procedure requires "the jury [to] grapple with the question of a defendant's guilt of the highest crime charged." (*People v. Fields, supra*, 13 Cal.4th at p. 304.)

all agree that the defendant is not guilty of . . . assault with force likely to cause great bodily injury." Contrary to the instructed procedure, for count 2 the jury returned a guilty verdict on the greater offense of assault by means of force likely to produce great bodily injury, and additionally returned guilty verdicts on the lesser offenses of both battery and simple assault.

Section 954 authorizes multiple convictions for offenses charged "under separate counts." (§ 954; see *People v. Reed, supra*, 38 Cal.4th at pp. 1226-1227.) We know of no authority permitting *two* convictions arising from a *single* count. To the contrary, it appears axiomatic that there may be only one conviction per count. (See, e.g., *People v. Escobar* (1996) 45 Cal.App.4th 477, 483, fn. 2 [parties and appellate court agreed that lesser related offense conviction should be stricken in case where jury returned guilty verdicts for both greater and lesser offenses for single count]; *People v. Wissenfeld* (1951) 36 Cal.2d 758, 766 [when jury returned two guilty verdicts for one count, trial court properly instructed jury to clarify which offense it had chosen]; see also *People v. Caird* (1998) 63 Cal.App.4th 578, 588-589.)

If the battery offense had been charged in a count *distinct from count 2*, section 954 would authorize a conviction of assault by means of force likely to produce great bodily injury and a separate conviction of the lesser related offense of battery. Here, however, there was no express amendment to the accusatory pleading to charge battery as an offense separate from count 2. (See *People v. Birks* (1998) 19 Cal.4th 108, 129 [after arraignment, amendment of accusatory pleading requires court approval].) Further, contrary to the Attorney General's contention, the record does not support a conclusion

that the information should be deemed impliedly amended to allege battery in a separate count.[9]

A defendant has a due process right to notice of the charges against him. (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1117.) The information provides the defendant with notice of "'what *kinds* of offenses he is charged with . . . and . . . the *number* of offenses (convictions) that can result from the prosecution.'" (*People v. Butte* (2004) 117 Cal.App.4th 956, 959.) Based on the information, Jeffcoat had notice that he could receive a conviction for count 2, and there is nothing in the record suggesting that he should have expected the possibility of *two* convictions for count 2. He requested, and received, instruction on the lesser offense of battery for count 2.[10] The jury was instructed not to return a guilty verdict on battery unless he was not guilty of the greater offenses for count 2. Based on this instruction, it is clear that the parties and the court expected that the jury would return a single conviction for count 2.

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9 The California Supreme Court has explained that the concept of an implied amendment to an accusatory pleading is a fiction, and that the real issue is whether the defendant has notice of the charges. (*People v. Toro* (1989) 47 Cal.3d 966, 973, fn. 4, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) Nevertheless, the implied amendment concept remains a useful analytical tool (see, e.g., *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 263-264), and we apply it here to determine whether there is a basis to permit the battery conviction.

10 Although in their supplemental briefing the parties state that there was an agreement to submit the battery offense to the jury as a lesser related offense of the charged count 2 offense, the record suggests that Jeffcoat and the trial court construed battery as a lesser included offense. In any event, this matter is not pivotal to our due process/notice inquiry. Regardless of whether battery is necessarily included in or merely related to the charged count 2 offense, there is nothing in the record suggesting Jeffcoat should have anticipated two convictions for a single count.

The instruction telling the jury to return only one guilty verdict for count 2 is consistent with the purpose of instruction on uncharged lesser offenses. The reason a trial court is required to instruct, and a defendant might request instruction, on uncharged lesser offenses is to provide the jury with additional verdict options when there is evidence the defendant has committed the lesser *but not the greater offense*. (See *People v. Birks, supra*, 19 Cal.4th at pp. 118-121.) Thus, submission of one or more uncharged offenses to the jury as lesser offenses of a single charged count typically contemplates that the jury will select *one* of the lesser uncharged offenses if it finds the defendant is not guilty of the charged greater offense. Indeed, none of the cases we have reviewed which discuss uncharged lesser offenses, including those cited by the Attorney General, involve a situation where the defendant sustained *two* convictions for a *single* charged count. Rather, in all of these cases the defendant sustained no more than *one conviction per charged count.* (See, e.g., *id.* at pp. 112-115; *People v. Toro, supra*, 47 Cal.3d at pp. 970-971; see also *Orlina v. Superior Court, supra*, 73 Cal.App.4th at p. 260.)

Although Jeffcoat was on notice that the information impliedly charged the battery offense as a lesser offense *of count 2* (see *People v. Birks, supra*, 19 Cal.4th at pp. 117-118, 136, fn. 19; *People v. Fields, supra*, 13 Cal.4th at p. 308; *People v. Toro, supra*, 47 Cal.3d at p. 973*; Orlina v. Superior Court, supra*, 73 Cal.App.4th at pp. 263-264), there is nothing to suggest that he was on notice that the information could be construed as impliedly charging the battery offense as a lesser offense *in a distinct count*. Under these circumstances, there is no basis to sustain the battery conviction in addition to the

conviction for assault by means of force likely to produce great bodily injury. Accordingly, the battery conviction must be dismissed.

DISPOSITION

The judgment is modified to strike the misdemeanor convictions for battery and assault. As so modified, the judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

MCINTYRE, J.

O'ROURKE, J.